In the Supreme Court of the United States

OCTOBER TERM, 1953

No. 386

RISS & COMPANY, INC., APPELLANT

v.

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION AND AKRON, CANTON & YOUNGSTOWN RAILROAD COMPANY, ET AL.

MOTION TO AFFIRM

Pursuant to Rule 12, paragraph 3, of the Revised Rules of the Supreme Court of the United States, appellee, the Interstate Commerce Commission, moves that the judgment of the District Court in the above action be affirmed.

This is a direct appeal from a final decree dismissing appellant's complaint, entered May 7, 1953, by a three-judge district court convened pursuant to 28 U. S. C. 2284 and 2325. Plaintiff filed a motion for new trial on May 15, 1953, which was denied by order of the District Court on July 7, 1953. Petition for appeal was filed by plaintiff on August 24, 1953, and allowed by order of the District Judge on the same day. The

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District Court complaint was filed July 18, 1952, heard by the three-judge Court on November 12, 1952, final decree entered May 7, 1953, motion for new trial filed May 15, 1953, motion denied July 7, 1953, motion for injunction pending appeal filed and served by mail at Kansas City, Missouri, on July 11, 1953 (Saturday), after oral argument, order for injunction was issued by the three-judge Court, on July 16, 1953, to expire August 31, 1953, unless sooner terminated by this Court, and petition for appeal filed and allowed August 24, 1953.

The complaint sought to set aside an order of the Commission, entered June 2, 1952, requiring plaintiff to cease and desist from operations under temporary authority issued to Riss & Company, Inc., in No. MC-200 (Sub-No. 60 TA). The said operating authority was interpreted to consist of the regular and irregular routes, points and places, and territorial scope as fully stated in said Appendix. The Commission report held that operations not embraced in the said appendix were not included and embraced in the grant of authority in the (Sub-No. 60 TA) proceeding, and as such were unauthorized.

The basic question here presented is, what was the scope of the temporary authority granted to Riss & Company, Inc., by the order in No. MC-200 (Sub-No. 60 TA) entered April 16, 1946. Subordinate questions relate to Commission authority to interpret that grant of temporary

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authority, to notice and hearing required by law, to what if any authority was continued by reason of the application for permanent authority, under Section 9 (b) of the Administrative Procedure Act, 5 U. S. C., Sec. 1008 (b), to what extent, if any, the authority was restricted or changed by the report and order herein, and to the interpretation of the authority as more fully stated in the Commission report of June 2, 1952, 54 M. C. C. 531, and restated in the opinion of the Court below, and to court determination upon the merits. These are the principal questions raised by appellant's jurisdictional statement.

The questions in this appeal relate only to temporary authority granted appellant, the interpretation thereof, and the procedure in making that determination. It does not relate to any other motor carrier, or in its effect, deny or refuse to authorize service needed by the Defense Department. The interpretation and procedure relate solely to interpreting the temporary certificate issued to appellant in MC–200 (Sub-No. 60 TA), and determination of the territorial limits therein prescribed. It does not relate to or affect any other operating authority of appellant. The report involved, page 534, suggests that, if there is a need for additional service, it may be met by filing further applications for temporary or permanent authority. For reasons herein stated, the claim of appellant, jurisdictional statement page 7, that issues presented

are of importance to the entire motor carrier industry, is without merit.

The jurisdictional statement of statutes involved, page 2, omits the most important statute here involved, Section 210a, 49 U. S. C. 210a, and other statutes considered by the Commission and Court below, viz., Section 204 (a) (6), and Section 222 (a) (b), 49 U. S. C. 304 (a) (6), and 322 (a) (b). Therefore such omitted statutes are quoted in the appendix hereto.

What was the scope of the temporary authority here involved?

The application of Riss & Company, filed March 1, 1946, in the proceeding No. MC–200 (Sub–No. 60 TA) was for temporary authority, under provisions of Section 210a of the Interstate Commerce Act, 49 U. S. C. sec. 310a, to transport, in the exact words of the application as quoted in the opinion of the Court below, page 23, "Explosives and U. S. Army Ordnance Stores" over "regular" routes "between points named in I. C. C. Order of February 3, 1945 in * * * MC–200, Sub 46 (formerly Monark Motor Freight System Docket MC 30077)," until June 30, 1946 (Exh. 13). The certificate was granted April 15, 1946 until June 30, 1946 for transportation of *"Dangerous Explosives,* To, from and/or between points and places authorized to be served in connection with Docket Nos. 30077 and effective sub-numbers thereunder which were acquired by applicant herein" (Exh. 16). More than a year

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previously the Commission had on February 3, 1945, decided and specifically described the "grandfather" authority of Riss & Company, under MC–200, Sub 46 (as stated in the application "formerly Monark Motor Freight System Docket MC 30077)." The language of that application and the granting of the certificate do not permit of any other interpretation than that the scope of the authority granted, in No. MC–200 (Sub–60 TA), was limited precisely to routes and points named in the "order of February 3, 1945 in * * * No. MC–200, Sub 46." That is the one important and controlling fact necessary to a correct legal interpretation of the certificate issued in No. MC–200 (Sub–No. 60 TA), the only authority here involved. Other technical questions raised by plaintiff-appellant and considered by the Court below are unnecessary to any reasonable interpretation of this temporary authority.

Appellant has never claimed to the Commission, the Court below, or in the jurisdictional statement herein, that the above quoted portions of the application and certificate are not true and correct. Certified copies of the application (Exh. 13) and certificate (Exh. 16) are in the record of the Court below, and are designated in No. 6 of the Praecipe on Appeal. Appellant's jurisdictional statement, page 13, admits that the Commission report of June 2, 1952, here involved, is in evidence and contains in the Appendix thereto "the complete description of the points and places

and the manner of performing service specified in the certificate issued in Docket No. MC–200 Sub–No. 46)." The report, page 534, states that this appendix details the extent of Riss' authority to transport dangerous explosives under No. MC–200 (Sub–No. 60TA), from, to, and between the same points and in the same manner that it is authorized to transport other commodities under certificate No. MC–200 (Sub–No. 46). Since that was specifically the authority applied for and granted in MC–200 (Sub–60 TA), there can be no possible doubt, under the record herein, that the scope of that temporary authority is fully and correctly stated in the appendix to the report of June 2, 1952.

The detailed limits as set forth in such appendix constitute the entire authority applied for and granted, under MC–200 (Sub–60 TA), and any and all operations of Riss beyond such limits are unauthorized, unless under some other authority granted by the Commission. There are such other authorities recognized in the opinion of the Court below, page 24, (Exh. 21), not here concerned or disturbed. ***The question here relates to the claim of Riss that under the temporary authority granted in MC–200 (Sub–60 TA) operations beyond the territorial scope as detailed in MC–200 (Sub–46) and specified in the appendix to the report herein, were legally authorized. The Commission report held such operations were unauthorized.***

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The vital question decided by the Commission was the territorial scope of said temporary authority. The basic question decided by the Court below was that the Commission interpretation of the territorial scope of such temporary authority was lawful. The controlling issue presented by this appeal is whether or not the Court below erred, as a matter of law, in its decision. If that Court decision is legally correct it necessarily follows that the Commission's interpretation of this authority of appellant is also legally correct. *If both are legally correct operations of Riss beyond the territorial scope of its temporary certificate under MC–200 (Sub–60 TA) are certainly unlawful, and have been such since the issuance thereof April 15, 1946.*

The cease and desist part of the order of June 2, 1952, here involved, depends wholly upon the lawfulness of the Commission's interpretation of the temporary authority. Since that relates only to unlawful operations beyond the limits specified under the Commission interpretation, the cease and desist order must stand or fall with the final decision upon the question of interpretation. For these reasons the cease and desist order in no wise determines the lawfulness or unlawfulness of operations beyond the scope of the authority held, and is therefore not the determinative factor as to whether the Commission procedure was under a petition or complaint, or required the application of provisions of Section 204 (c) of the Inter-

state Commerce Act, 49 U. S. C., sec. 304 (c). That section provides for investigation, after notice and hearing, of any failure of motor carriers to comply with provisions of the Act or requirements established thereunder. The Commission is vested with no administrative authority to "compel" such compliance, and is wholly dependent upon court action to enforce obedience to its orders, prosecution under section 222 (a) by the United States Attorney, or by petition to the courts for injunction under Section 222 (b), 49 U. S. C. 322, which may be filed by the Commission.

The opinion of the Court below, pages 17, 18, 19 and 20, extensively considered the question of the proper procedure under a "petition" or a "complaint", and held the "petition" filed with the Commission "is the kind of thing meant by 'complaint' as used in 204 (c)." The Commission report, page 531, held that the "petition", in effect, sought an interpretation as to the territorial extent of temporary authority granted in No. MC–200 (Sub–No. 60 TA), and could properly be considered under rule 102 of its General Rules of Practice. That rule provides, when the subject matter of any desired relief is not specifically covered by the rules, "a petition seeking such relief and stating the reasons therefor may be served and filed." The Court below decided that the "complaint" required "notice and hearing" as provided in Section 204 (c),

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and proceeded to resolve that question on the basis of the record presented, by holding there was a proper "notice" to Riss, and an adequate "hearing" since the fact issue was conceded by admissions of appellant, leaving only a question of law to be decided by the Commission, as based upon official records in its files, viz., "the interpretation of the territorial limits of its Sub–No. 60 TA." (Opinion, pages 18 to 25, incl.)

It seems clear that the reference to "notice and hearing" in Section 204 (c) provided counsel with the opportunity to repeatedly claim that Riss had been denied a notice and hearing. It is equally clear that Riss was in fact accorded full notice and hearing, whether under the "petition" or the "complaint," as was decided by the Court. The argument respecting notice and hearing created so much confusion that it led the Court below to decide the question on the basis of Section 204 (c) requirements. That kind of hearing would be before an examiner, for the purpose of introducing testimony of witnesses. As the Court below held, the only fact question involved was whether or not Riss had been operating beyond the scope of its Sub–60 TA authority, which Riss admitted in its motion to dismiss, and left only the certificate interpretation for the Commission to decide, a question of law, requiring consideration only of official records subject to judicial notice by the Commission. Except for this admission an examiner hearing and proof of actual

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illegal operations would have been essential to issuance of the cease and desist order. Riss elected to move dismissal of the petition, rather than to answer and deny allegations therein, one of which was that Riss had been operating beyond the scope of its Sub–60 TA authority. Even without the actual admission of such operations the motion to dismiss, in legal effect, necessarily admitted facts alleged in the petition, and presented only a question of law as held by the Court below.

The cease and desist order was based upon appellant's admission as to its operations, which were beyond the territorial scope of the Sub–60 TA certificate as interpreted by the Commission. Except for that interpretation and the admission as to operations, there could have and would have been no cease and desist order. That part of the order was unnecessary to interpretation of the Sub–60 TA temporary authority.

The Commission has authority to interpret certificates issued by it

Appellant does not question Commission authority to interpret certificates of motor carrier. That it has such authority appears to be well established under various Court decisions. The opinion of the Court below, page 18, so held, with the statement, "Such is a necessary power to enable it to perform its duties under section 204 (a) (6) of the Act." 48 U. S. C. 304 (a) (6). That section provides "That it shall be the duty of the Commission * * * (6) to administer, execute,

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and enforce all provisions of this part, to make all necessary orders in connection therewith, and to prescribe rules, regulations, and procedure for such administration." Rule 102 above referred to was adopted under that authority, and was here applied, as stated in the report, page 531, in determining the procedure required for interpretation of this certificate. The report held that the petition sought that interpretation. It did not consider the cease and desist order until the primary question had been decided. It is then stated, pages 534–535, that in view of petition allegation of Riss operations, and that Riss had not denied the allegation but claimed its holding out to serve numerous points not embraced in the appendix, cessation of such unauthorized operations would be ordered. That was the natural legal consequence of the interpretation and was possible only because of admission of Riss. Perhaps the opinion of the Court below regarded the question of notice and hearing, as did the Commission, in respect to the interpretation, but the Court unnecessarily decided the "petition" was a "complaint" when the petition was considered as a unit. This is indicated by the opinion statement, page 18, to effect that the commission can exercise the power "even though it does so in a proceeding which seeks only a declaratory order construing a certificate," citing *Carroll Trucking Company Interpretation of Certificate,* 52 M. C. C. 178. Every court decision on the subject cited

by appellant and the Court below support Commission authority to interpret certificates, and those cases relate to permanent, not temporary certificates. The discretionary provisions of Section 210a indicate more certainly authority to interpret temporary certificates, perhaps "in its discretion and without hearings or other proceedings."

The question of notice and hearing

Appellant contends that it was not afforded "notice and hearing" as required in a "complaint" proceeding under Section 204 (c). Apparently the contention is designed to confuse the issue, by appearing to claim the right to hearing before an examiner, and seeking escape from the correct conclusion of the Court below, that the Commission procedure provided an adequate hearing. As stated by the opinion below Riss was served with a copy of the "petition" and replied thereto with a motion to dismiss. This refutes the continued contention that that notice was not given. The jurisdictional statement admits, page 3, that the motion to dismiss was filed, and after the report and order of June 2, 1952, a petition for reconsideration was filed June 30, 1952. The contention of appellant respecting "notice and hearing" never in any instance made any specification as to what issue or fact required a hearing before an examiner. There is no merit to the contention, as held by the Court below, considering the "petition" as a "complaint," and even less

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if considered as a "petition" as was done by the Commission. There is no legal purpose in having a formal hearing before an examiner upon a matter of law, where only official documents of the Commission have any bearing upon the issues. The report and order of June 2, 1952, here involved, are in the same docket, No. MC–200 (Sub-No. 60 TA), in which the certificate was granted. Had Riss denied operations alleged to be unlawful, and the competence of petitioners to so petition, a formal hearing before an examiner would have been legally necessary to provide evidence relating to those facts.

Admission of Riss made it possible to legally hear the "petition" by the Commission directly. The Interstate Commerce Act permits the Commission to hear and decide cases coming before it, or it *may* refer any matter to a Division or board of three members. The Commission may hear testimony and other evidence, and commonly does so. Court decisions do not preclude the Commission itself from hearing any matter that comes within its jurisdiction, or require reference to an examiner, a board, or a Division for hearing. That is made the discretion of the Commission under the Act. Section 17 (2) and (6), 49 U. S. C. 17 (2) (6). The procedural authority of Section 17 is applicable to motor carriers under Section 205 (b), and specifically preserves the discretion to direct hearings by any member, examiner, or joint board (c), except for joint boards re-

quired under (a). (49 U. S. C. 305 (a) (c) and (h). The Commission in hearing the proceedings herein was authorized to hear testimony and other evidence. Had Riss made any showing as to other evidence necessary to the decision the Commission had authority to receive it or to refer to a Division, board, or an examiner to hear and receive it. Riss has not disclosed any such evidence either to the Commission or to the Court, but has elected to rely upon the bare statement that it was entitled to a hearing. It was afforded a hearing, as the Court below held was adequate.

Apparently Riss chose to rely upon its contention that the certificate authorized operations to the extent of is claims under the Monark "grandfather" application, not limited to operations determined to be authorized in the Sub–46 proceedings. Whether that contention was and is legally correct is the decisive question presented herein. That contention was made in the Riss motion to dismiss and noted in the report, page 533.

The contention was made to the Court below. As stated in the opinion, page 26, it was, that the interpretation of the Commission is basically wrong because the authority under Sub–60 TA is not limited by the territorial restrictions in permanent certificate Sub–No. 46, but includes all points which it claimed to serve as successor to Monark "grandfather rights." The Commission held such contentions were untenable, page 534, since the temporary authority, by its very terms,

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is directly tied to the points authorized to be served in MC–200 (Sub–46). The precise territorial specification of Sub–46 authority in the February 3, 1945, order, was later approved by the courts as the final Commission order in that proceeding, 100 F. Supp. 468, 478 (1951), affirmed *per curiam* 342 U. S. 937 (1952). The report herein, page 534, states that points served under color of claimed "grandfather" rights, later found not supported by proof of *bonafide* operations on June 1, 1935, and continuously thereafter, are not in any conceivable sense "authorized" points. The report, page 532, notes that the actual certificate was issued after the order of February 3, 1945, and Court opinion, page 15, correctly notes the issuance date of the certificate as February 21, 1950. Beyond question the territorial limits specifically set forth in the order of February 3, 1945, are identical with the Monark certificate authority, set forth in the certificate issued February 21, 1950, and as set forth in the appendix to the report of June 2, 1952. If the Commission, in its discretion, may grant a temporary certificate without hearing or other proceeding, as the statute provides, the interpretation thereof must require no less discretion or different procedure.

The Carroll report is later referred to in the opinion, page 20, footnote 5, with statement that the Commission usually accorded hearings, apparently referring to Examiner hearing, where

the only issue is interpretation of a certificate. This is an erroneous statement, suggested by appellant arguments and repeated in its jurisdictional statement, page 12. In the first Carroll interpretation report, 52 M. C. C. 178 (1950), the decision was made on a petition, without hearing before an examiner. Only in the second Carroll case, 54 M. C. C. 664, (1952), was the question referred to an examiner for hearing, and then because the application proceeding involved the same parties and subject matter, and hearing was necessary to prove public convenience and necessity and fitness of applicant. The prior interpretation was affirmed.

The Court opinion, page 19, noted the Riss contention that a cease and desist order cannot be made by the Commission where the effect would deny the right, in an action under Section 222 (a) or 222 (b), to place in issue the scope of the certificate, and held the contention sound, since it would deny opportunity to challenge the Commission interpretation in a judicial proceeding against it. The opinion stated this to be the legal doctrine that Commission orders are not subject to collateral attack but must be tested judicially in direct review of such orders, citing as authority for such statements, *Southwest Freight Lines* v. *I. C. C.*, 8 Cir., 184 Fed. 149, 151; *I. C. C.* v. *G. & M. Motor Transfer Co.*, 64 F. Supp. 302, and *I. C. C.* v. *Consolidated Freightways, Inc.*, 41 F. Supp. 651, 655. Appellant in its jurisdictional

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statement, pages 13, 14, repeats this contention, citing as authority therefor the first two above cases by the Court opinion.

These contentions and holdings are clearly not supported by the cited authorities. The Court action herein is a direct challenge of the Commission interpretation of Sub–60 TA authority, upon the merits and legality thereof. That interpretation determines the limits of the original grant in Sub–60 TA, and presents the issue as to Commission authority to make the interpretation, and in that connection the legality of proceedings in which the order was entered. The cases cited support that authority. In *Consolidated Freightways* the Commission applied to the court for injunction under Section 222 (b), to restrain operations beyond the scope of that certificate. Consolidated contended that the order granting certificate was invalid and the opinion stated that it amounted to a collateral attack for which there is no foundation or basis in law. That case did not involve an interpretative order, except as essential to the institution of the action. In effect the holding as to collateral attack did not in any manner deny the right to attack the granting order. The Court held the action was merely to restrain unlawful operations prohibited by Section 306 (a), 49 U. S. C. 306, and required court interpretation of that certificate. The injunction sought by the Commission was granted.

In G. &. M. Transfer action by the Commission sought injunction to restrain operations beyond the scope of the certificate, *as previously interpreted by the Commission in a petition seeking clarification of the certificate.* The opinion there held that the certificate, as so interpreted, could not be subjected to collateral attack and that the Commission interpretation was binding upon the court. The Commission report interpreting the certificate, is quoted at length in the Court opinion, and leaves no doubt that the procedure was under petition seeking clarification, and was determined without examiner hearing on the basis of official records of the Commission. That is practically the same question and situation presented by the petition to the Commission herein, which was determined in the same kind of procedure and upon the same kind of official records. The difference is that G. & M petitioned for clarification of its own permanent certificate, whereas competing carriers petitioned for interpretation of the Riss temporary certificate. G. & M. did not directly challenge validity of the Commission order interpreting its certificate, as Riss does in this action. The Court therefore could only determine the question as to whether operations were beyond the scope of certificate as interpreted by the Commission. Here appellant directly challenged validity of interpretation and there can be no question as to collateral attack.

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In *Southwest Freight Lines* the action was in the Western District of Missouri and heard by the District Judge, one of the three judges constituting the Court which decided the action herein. That action sought an injunction under Section 222 (b) to restrain operations alleged to be unlawful as prohibited by Section 306 (a), not authorized by a certificate. The pleadings presented the issue as to the scope of certificate authority, and interpretation thereof by the Court. The Commission had not interpreted that certificate except as was essential to institution of the action. The Court opinion interpreted that certificate upon the basis of alleged specific operations which were admitted by defendant. That case presented only a question of law, construction of a certificate, and was decided on the basis of pleadings, admissions of defendant, and consideration of "definitive decisions of the Interstate Commerce Commission," as stated in official Commission reports cited, in other cases having no relation to that decided. One of the cases cited was the Commission report in the *G. & M. case,* 43 M. C. C. 497, concerned in the above cited court decision. The Court was relieved of the legal necessity to hear testimony as to actual operations by admission thereof by defendant. Here the Commmission was relieved of the legal necessity for hearing proof of alleged unauthorized operations by reason of admissions in the Riss motion.

Upon appeal by defendant in *Southwest Freight Lines,* cited by the Court opinion herein and the jurisdictional statement of appellant, the opinion stated the only issue there presented was "interpretation of the certificate granted to applicant by the Commission." That opinion did hold that appellant could not convert the injunction action into a direct attack upon validity of the order evidenced by the certificate involved, and explained that "the courts may not usurp the jurisdiction of the Commission by granting appellant what the Commission had denied." The opinion referred to the *G. & M. case* holding that the Commission interpretation of its certificate was conclusive on the court and added "In the circumstances of the present case, the Commission's interpretation of its certificate though less formal is no less effective." The "less formal interpretation" there referred to was the interpretation essentially involved in instituting the injunction action.

Appellant's jurisdictional statement, page 12, cites *Akers Motor Lines, Inc.* v. *Malone Freight Lines, Inc.,* 53 M. C. C. 353, and the court action directly attacking that Commission interpretation, *Malone Freight Lines, Inc.* v. *United States,* 107 F. Supp. 946, affirmed *per curiam,* 344 U. S. 925, as support for the contention that the Commission consistently afforded full opportunity for hearing upon such complaints although the only controverted issue was the proper interpretation

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of the terms of the authority. The report, page 354, states that defendant admittedly is engaged in transporting property as alleged in the complaint, apparently admitted at the examiner hearing. It was stipulated that complainants operated under certificates as described in certain exhibits. It seems clear that the only legal reason for referring that "complaint" to an examiner was that pleadings did not admit actual operations or the legal standing of complainants. Had those two facts been admitted by Malone's reply there would have been no legal requirement for examiner hearing. Here, as pointed out in the opinion of the Court below, the Riss motion to dismiss the "petition" did admit the actual alleged operations, and did not there or since in any manner question the standing of petitioners to file the "petition." Here, as held by the Court below, the Commission did afford Riss an adequate hearing, without examiner participation, because questions of law only were to be decided.

Other questions presented

Contention of appellant to the Commission and the Court below, that the pending permanent application, in MC–200 (Sub–84), filed August 22, 1947, more than one year after issuance of the temporary certificate in Sub–60 TA, continued the legal right to operate within the scope of the application claims in the Monark proceeding, has apparently been abandoned, since no reference

thereto is made in the jurisdictional statement. For that reason the question is no longer an issue.

The controversy here relates solely to temporary authority under Section 210a. That section provides for grant of authority immediately and urgently needed where there is no carrier service capable of meeting the need in Commission discretion without hearing or other proceeding, valid for such time as the Commission shall specify, but not more than an aggregate of 180 days. Because of the war needs the Riss Sub-60 TA authority has been extended far beyond the statutory aggregate permitted, and by virtue of Section 9 (b) of the Administrative Procedure Act, 5 U. S. C. 1008, has remained in force and effect for more than seven years since first issued. The certificate was issued and the repeated renewals thereof were granted upon the basis that operations were needed to the extent granted. The Commission had the right to assume that Riss operated within the confines of the certificate. Under the language of the application and certificate, the territory prescribed was exactly stated in the Sub-46 order of February 3, 1945, and therefore fully known to Riss. Operations beyond the territorial scope of the certificate was unauthorized, and performance thereof was deliberate. Both Riss and the Navy Department must have been aware that there was no authority

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to operate beyond the Sub–46 limits during the seven-year life of the Sub–60 TA certificate, and that authority in excess thereof could be quickly obtained from the Commission upon new applications. That opportunity for procuring temporary authority was called to the attention of the Navy Department, in the reply of the Commission Secretary to the letter of June 11, 1953, requesting extension of effective date of the order herein, and is attached to appellant's petition for stay pending appeal. It cannot be doubted that both Riss and the Navy Department were fully informed and understood that extension of effective date of that order would not extend the scope of the authority granted in Sub–60 TA. Surely Riss and the Navy know that operations begun after 1935 are made unlawful under Section 206 (a), unless authorized in a certificate issued by the Commission. That the Defense Department needed the service of Riss beyond the scope of its certificate, does not render lawful any operations beyond what is there authorized. Neither the desire of Riss, nor request of Navy, can legally make such operations lawful, since only the Commission has the power to issue certificates. The insistence of Riss, supported by Navy, that it has the right to operate beyond the scope of Sub–60 TA authority, because of defense needs, is no reason for evasion of the law. The implication that the Commission here seeks to

deny the Defense Department transportation which it needs, or to compel that the service be given to railroads, is simply untrue and is unworthy of consideration. The effort of Riss in this litigation is and has been to procure some semblance of legal protection for unauthorized operations. To sustain the technical contentions of Riss herein would be a dangerous precedent, in respect to Commission discretion in issuing temporary authority, requiring much more time and careful study of applications than has heretofore been given, particularly as to those relating to the needs of the Defense Department. The Commission could ill afford to grant such applications, if it were decided that interpretation of certificates issued under the liberal statute requires the time-consuming observance of the extremely technical procedures here contended for by appellant. It should be noted that every court decision cited by either side herein relates to permanent, not to temporary authority. Also very few decisions of the Commission in respect to temporary authority, of the many that have been entered, appear in the official reports and therefore may not be cited. In the absence of court decisions respecting interpretation of temporary certificates, the cases cited herein, relating to permanent certificates, apply with even greater force.

Contentions of appellant are without merit. Decision of the Court below is legally correct. The motion to affirm the judgment of the Court below should be granted.

Respectfully submitted.

Edward M. Reidy,
EDWARD M. REIDY,
Chief Counsel.

APPENDIX

SEC. 204. [49 U. S. C., Sec. 304.]

(a) It shall be the duty of the Commission—

* * * * *

(6) To administer, execute, and enforce all provisions of this part, to make all necessary orders in connection therewith, and to prescribe rules, regulations, and procedure for such administration;

SEC. 210a. [49 N. S. C., Sec. 310a.]

(a) To enable the provision of service for which there is an immediate and urgent need to a point or points or within a territory having no carrier service capable of meeting such need, the Commission may, in its discretion and without hearings or other proceedings, grant temporary authority for such service by a common carrier or a contract carrier by motor vehicle, as the case may be. Such temporary authority, unless suspended or revoked for good cause, shall be valid for such time as the Commission shall specify but for not more than an aggregate of one hundred and eighty days, and shall create no presumption that corresponding permanent authority will be granted thereafter.

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